

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In The Matter of )  
 )  
Preemption of Local Zoning Regulation ) IB Docket No. 95-59  
of Satellite Earth Stations )

To: The Commission

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**COMMENTS  
OF  
THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE**

Pursuant to Section 1.430 of the Rules and Regulations of the Commission, NRTC, by its attorneys, hereby submits these Comments concerning the Commission's proposal to revise its rules to expand federal preemption of local zoning regulations which affect satellite earth stations.<sup>1/</sup> NRTC submits that the satellite industry would benefit greatly from these proposed rule changes.

**I. BACKGROUND**

1. NRTC is a non-profit cooperative association comprised of 521 rural electric cooperatives and 231 rural telephone systems located throughout 49 states. NRTC's mission is to assist member companies and affiliates in meeting the telecommunications needs of more than 60 million American consumers living in rural areas. Through the use of satellite distribution technology, NRTC is committed to

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<sup>1/</sup> Notice of Proposed Rule Making ("Notice"), 60 Fed. Reg. 28077 (released May 15, 1995).

extending the benefits of information, education and entertainment programming to rural America -- on an affordable basis and in an easy and convenient manner -- just like those services are available on cable in more populated areas of the country. NRTC seeks to ensure that rural Americans receive the same benefits of the information age as their urban counterparts.

2. Using C-Band technology, NRTC and its Members currently market and distribute packages of satellite-delivered programming, called "Rural TV<sup>®</sup>," to Home Satellite Dish ("HSD") subscribers throughout the country. C-Band distribution technology requires the use of relatively large (6-8') receiving antennas.

3. NRTC also provides high-powered Direct Broadcast Satellite ("DBS") services to rural subscribers across the country. Under an Agreement with Hughes Communications Galaxy, Inc. ("HCG"), NRTC, its Members and affiliated companies currently market and distribute up to 150 channels of popular cable and broadcast programming ("Direct TV<sup>®</sup>") to rural households equipped with 18-inch DBS satellite receiving antennas.

4. Accordingly, NRTC is engaged in the business of making available for purchase, by subscribers and customers, multiple channels of video programming. As a result, NRTC is a Multichannel Video Programming Distributor ("MVPD") pursuant to 47 C.F.R. § 76.1000(e).

5. In the Notice, the Commission proposes a major revision to its 1986 rule preempting, in part, local zoning regulations of satellite earth stations.<sup>2/</sup> In the 1986 Preemption Order, which is currently in force as Section 25.104 of the FCC's rules, the FCC limited federal preemption to cases where state and local municipalities regulated satellite receive-only antennas differently than other types of antennas.<sup>3/</sup> Moreover, the 1986 Preemption Order required aggrieved parties to exhaust all legal remedies before seeking Commission review and contained no enforcement provision.<sup>4/</sup>

6. The Commission issued its recent Notice in response to several petitions filed in the early 1990s by satellite programming providers seeking declaratory relief from the 1986 rules. Specifically, the petitioners complained that local zoning restrictions on lot sizes, antenna sizes, and permit costs, created unreasonable barriers to the growth of satellite-based services. The petitioners also asked the Commission to abandon its requirement that antenna users exhaust all of their legal remedies before seeking Commission review.<sup>5/</sup> Not surprisingly, state

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<sup>2/</sup> See, In re Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, ("1986 Preemption Order"), 51 Fed. Reg. 5519 (February 14, 1986).

<sup>3/</sup> At that time, receive-only antennas were much larger and generally raised greater aesthetic concerns.

<sup>4/</sup> 1986 Preemption Order, 51 Fed. Reg. 5519 (February 14, 1986).

<sup>5/</sup> The petitioners expressed concern that the exhaustion of remedies requirement essentially precluded effective action by the Commission in light of a 1992 court decision which held that the Commission did not have the authority to review local zoning disputes after a federal court already had decided that the ordinance was not preempted. See, Town of Deerfield v. FCC, 992 F.2d 420 (2d Cir. 1992).

and local governments have strongly opposed further preemption of municipal zoning authority as "federal intrusion".<sup>6/</sup>

7. In issuing the Notice, the Commission has attempted to reflect both the federal interest in widespread access to satellite communications and the state and local interest in municipal land-use regulation. The Commission stated:

The changes we propose are intended to modify our preemption rule in such a way as to minimize costs on local governments and on antenna users and to accommodate the legitimate interests of both. ... Our goals are to promote healthy competition and to facilitate access to satellite-delivered services.<sup>7/</sup>

## II. COMMENTS

8. For NRTC and similarly situated entities, local zoning regulations often create unreasonable barriers to the growth of satellite-based services. These barriers generate uncertainty among consumers and investors, which, in turn, unnecessarily impedes the development and growth of healthy competition and hampers consumer access to satellite-delivered services. NRTC supports the revised rules proposed by the Commission because they will provide satellite antenna users and state and local governments with greater certainty about the extent to which zoning ordinances or other nonfederal laws may impinge upon the federal interest in facilitating access to increasingly important satellite communications technologies.

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<sup>6/</sup> See, e.g., Comments of the National League of Cities (July 12, 1993), at 1.

<sup>7/</sup> Notice, at ¶ 45.

9. Section 25.104 currently provides a "differentiation" requirement that limits federal preemption to those local ordinances that "differentiate between satellite receive-only antennas and other types of antenna facilities." 47 C.F.R. § 25.104. Because the 1986 Preemption Order only preempted state and local regulations which differentiated between receive-only and other types of antennas, local zoning regulations often apply evenly against both larger dishes, such as C-band dishes, and smaller dishes, such as DBS dishes. Thus, DBS and C-band dishes are often regulated alike, despite the differences in their size and aesthetic qualities.<sup>8/</sup> Under existing regulations, a local zoning ordinance could unreasonably restrict all types of antennas and be beyond the scope of federal preemption. The Commission specifically stated in its Notice that this "differentiation" requirement has "caused unintended results".<sup>9/</sup> To rectify this situation, the Commission's Notice proposed to remove this differentiation requirement from Section 25.104. NRTC believes this proposal is commendable, particularly since it would permit federal preemption to apply in more instances than under current regulations and would eliminate the highly artificial "differentiation" requirement.

10. In its Notice, the Commission proposed to revise Section 25.104(b) so that any ordinance that substantially increases the cost or substantially limits the reception of an antenna smaller than one meter would be subject to the basic

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<sup>8/</sup> Notice, at ¶ 29.

<sup>9/</sup> Notice, at ¶ 53.

reasonableness test, but would be presumed unreasonable.<sup>10/</sup> In addition, the Commission proposed that any regulation of receive-only antennas with diameters of two meters or less in commercial and industrial areas, or one meter or less in any area, would be presumed unreasonable, unless the regulation is "necessary to accomplish a clearly defined and expressly stated health or safety objective" and is no more burdensome to satellite users than necessary to achieve that objective.<sup>11/</sup> Thus, the Commission correctly recognized that unreasonable restrictions are routinely placed on satellite earth stations by local zoning authorities and moved to correct this situation by placing the burden of justification for such restrictive regulations squarely upon the local zoning authorities.<sup>12/</sup>

11. In order to avoid federal preemption under the proposed rules, state and local zoning authorities would have to demonstrate that the zoning regulation is reasonable. NRTC supports the Commission's proposal to reformulate the reasonableness test by eliminating the current balancing test between issues of cost and reception and replacing it with a reasonableness test that would apply to

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<sup>10/</sup> Notice, at ¶ 64.

<sup>11/</sup> Notice, at ¶ 64.

<sup>12/</sup> The Commission also proposed that regulation of satellite transmitting antennas should be preempted in the same manner as earth stations, except that state and local health and safety regulations relating to radio frequency radiation of transmitting antennas would not be preempted. NRTC urges the Commission to apply to satellite transmitting antennas the same non-restrictive standards which it has proposed for satellite earth stations.

ordinances that substantially limit reception or impose substantial costs on users.<sup>13/</sup>

The Commission properly noted that "substantial" is a lower threshold than the previous language ("enough to be unreasonable") and that substantial is triggered if "a federal interest has been burdened in a way that is not insignificant, and which therefore calls for justification."<sup>14/</sup> NRTC applauds this proposal because it correctly recognizes the negligible health, safety and aesthetic impact of modern technologies, such as the small DBS dishes, upon commercial and residential areas. At the same time, the Commission's proposal attains the proper equilibrium between local zoning considerations and national interests, such as full competition and access to video programming.<sup>15/</sup>

12. NRTC supports the Commission's proposal that any nonfederal objective offered by the local zoning authority in order to rebut a presumption of unreasonableness must be definitively stated in the regulation itself.<sup>16/</sup> This change would negate any efforts by zoning proponents to engage in post hoc rationalization to justify their unreasonable restrictions.

13. In its 1986 Preemption Order, the Commission stated that

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<sup>13/</sup> Notice, at ¶ 58.

<sup>14/</sup> Notice, at ¶ 58.

<sup>15/</sup> See, Notice, at ¶ 43; See also, Comments of NRTC in response to the Commission's Notice of Inquiry, CS Docket No. 95-61 (filed June 30, 1995).

<sup>16/</sup> Notice, at ¶ 67.

Any party requesting Commission review of a controversy will be expected to show that other remedies have been exhausted.

In re Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, 51 Fed. Reg. 5519 (February 14, 1986), at ¶ 40.

In its Notice, the Commission proposed to relax the "exhaustion of remedies" requirement by increasing the availability of Commission review of local zoning decisions.<sup>17/</sup> Under the proposed rules, a party seeking a ruling on whether local zoning regulations are preempted need only exhaust all non-federal administrative remedies, rather than all legal remedies, prior to seeking Commission review.<sup>18/</sup> NRTC supports this proposal to enable parties aggrieved by local satellite zoning restrictions to seek, and obtain, redress from the Commission at a much earlier stage in the legal process. Rather than waiting years until the federal courts have determined their case, the Commission's proposal would amend Section 25.104(e) to permit aggrieved parties to simply exhaust all nonfederal administrative remedies and then file a petition with the Commission requesting preemption. NRTC submits that this proposal would promote relatively prompt and inexpensive resolution of zoning disputes.

14. In addition, the Commission proposed to deem administrative remedies automatically exhausted once an application has been pending before the state or local authority for more than ninety days.<sup>19/</sup> NRTC supports this proposal because it

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<sup>17/</sup> Notice, at ¶ 48.

<sup>18/</sup> Notice, at ¶ 44.

<sup>19/</sup> Notice, at ¶ 46.



will permit swift resolution of disputes by enabling parties to circumvent potentially endless rounds of local hearings and applications. The Commission also proposed to allow a party to seek review when a grant of authority is conditioned upon a petitioner's expenditure of an amount greater than the antenna's purchase and installation costs.<sup>20/</sup> NRTC fully endorses this proposal since it will defeat attempts by local zoning authorities to, in effect, hold satellite dish zoning permits for ransom.

### **III. CONCLUSION**

As a MVPD serving rural areas of the country through C-Band and DBS technologies, NRTC strongly urges the Commission to adopt these proposed rule changes. The DBS distribution market, in particular, would benefit from adoption of the proposals to protect in any area those dishes which are one meter or less in diameter by imposing a presumption of unreasonableness upon local regulations which affect their installation, maintenance or use.

NRTC also strongly supports the Commission's plan to loosen the requirements for exhaustion of remedies. The Commission's proposed changes would result in an increase in the number of successful actions brought by consumers and others against unreasonable local zoning restrictions. NRTC points out that increased competition in the delivery of video programming and widespread access to satellite-delivered services are both goals which are regularly promoted by the Commission

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<sup>20/</sup> Notice, at ¶ 46.

through actions such as the Annual Report to Congress on the Status of Competition in the Market for the Delivery of Video Programming.<sup>21/</sup> Without these modifications to the Commission's rules, competition in the market for the delivery of video programming and access to satellite-delivered services will remain stifled by unreasonable local zoning restrictions.

**WHEREFORE, THE PREMISES CONSIDERED,** the National Rural Telecommunications Cooperative urges the Commission to consider these Comments and to revise its rules in accordance with the views expressed herein.

**Respectfully submitted,**

**NATIONAL RURAL  
TELECOMMUNICATIONS COOPERATIVE**

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<sup>21/</sup> See, Notice of Inquiry, CS Docket No. 95-61; and Notice, at ¶ 78.